

1 COMMITTEE REPORT

2 January 28, 2015

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H. 3114

5

6 Introduced by Reps. Nanney, Hicks, Allison, Atwater, Ballentine,
7 Bannister, Bingham, Brannon, Burns, Chumley, Clary, Corley,
8 H.A. Crawford, Crosby, Daning, Delleney, Erickson, Forrester,
9 Gagnon, Goldfinch, Hamilton, Henderson, Herbkersman, Hiott,
10 Huggins, Kennedy, Limehouse, Loftis, Long, McCoy, Merrill,
11 D.C. Moss, Newton, Pitts, Pope, Quinn, Ryhal, Sandifer,
12 G.M. Smith, G.R. Smith, Stringer, Tallon, Taylor, Thayer, Yow,
13 Wells, Willis, Hixon, Putnam and Rivers

14

15 S. Printed 1/28/15--H.

16 Read the first time January 13, 2015.

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18

19 THE COMMITTEE ON JUDICIARY

20 To whom was referred a Bill (H. 3114) to amend the Code of
21 Laws of South Carolina, 1976, by adding Article 5 to Chapter 41,
22 Title 44 so as to enact the "South Carolina Pain-Capable Unborn
23 Child Protection Act", etc., respectfully

24 REPORT:

25 That they have duly and carefully considered the same and
26 recommend that the same do pass:

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28 F. GREGORY DELLENEY, JR. for Committee.

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9 **A BILL**

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11 TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA,
12 1976, BY ADDING ARTICLE 5 TO CHAPTER 41, TITLE 44 SO
13 AS TO ENACT THE "SOUTH CAROLINA PAIN-CAPABLE
14 UNBORN CHILD PROTECTION ACT", TO PROVIDE
15 FINDINGS OF THE GENERAL ASSEMBLY, TO DEFINE
16 NECESSARY TERMS, TO REQUIRE A PHYSICIAN TO
17 CALCULATE THE PROBABLE POST-FERTILIZATION AGE
18 OF AN UNBORN CHILD BEFORE PERFORMING OR
19 INDUCING AN ABORTION, TO PROVIDE THAT AN
20 ABORTION MAY NOT BE PERFORMED IF THE PROBABLE
21 POST-FERTILIZATION AGE OF THE UNBORN CHILD IS
22 TWENTY OR MORE WEEKS, TO PROVIDE FOR
23 EXCEPTIONS, TO REQUIRE CERTAIN REPORTING BY
24 PHYSICIANS WHO PERFORM ABORTIONS TO THE
25 DEPARTMENT OF HEALTH AND ENVIRONMENTAL
26 CONTROL, TO REQUIRE THE DEPARTMENT OF HEALTH
27 AND ENVIRONMENTAL CONTROL TO PREPARE PUBLIC
28 REPORTS THAT PROVIDE DATA ON ABORTIONS
29 PERFORMED IN THE STATE AND TO PROMULGATE
30 REGULATIONS, TO PROVIDE FOR A CIVIL RIGHT OF
31 ACTION FOR CERTAIN INDIVIDUALS AGAINST A
32 PHYSICIAN PERFORMING AN ABORTION IN VIOLATION
33 OF THE ACT AND FOR INJUNCTIVE RELIEF, TO CREATE
34 CRIMINAL PENALTIES, AND TO PROVIDE THE ACT DOES
35 NOT IMPLICITLY OR OTHERWISE REPEAL ANOTHER
36 PROVISION OF LAW.

37

38 Be it enacted by the General Assembly of the State of South
39 Carolina:

40

41 SECTION 1. Chapter 41, Title 44 of the 1976 Code is amended by
42 adding:

1
2 “Article 5
3
4 South Carolina Pain-Capable Unborn Child Protection Act
5

6 Section 44-41-410. This article may be cited as the ‘South
7 Carolina Pain-Capable Unborn Child Protection Act’.
8

9 Section 44-41-420. The General Assembly makes the following
10 findings:

11 (1) Pain receptors (nociceptors) are present throughout the
12 unborn child’s entire body and nerves link these receptors to the
13 brain’s thalamus and subcortical plate by no later than twenty
14 weeks.

15 (2) By eight weeks after fertilization, the unborn child reacts to
16 touch. After twenty weeks, the unborn child reacts to stimuli that
17 would be recognized as painful if applied to an adult human, for
18 example, by recoiling.

19 (3) In the unborn child, application of such painful stimuli is
20 associated with significant increases in stress hormones known as
21 the stress response.

22 (4) Subjection to such painful stimuli is associated with
23 long-term harmful neurodevelopmental effects, such as altered pain
24 sensitivity and, possibly, emotional, behavioral, and learning
25 disabilities later in life.

26 (5) For the purposes of surgery on unborn children, fetal
27 anesthesia is routinely administered and is associated with a
28 decrease in stress hormones compared to their levels when painful
29 stimuli are applied without such anesthesia.

30 (6) The position, asserted by some medical experts, that the
31 unborn child is incapable of experiencing pain until a point later in
32 pregnancy than twenty weeks after fertilization predominately rests
33 on the assumption that the ability to experience pain depends on the
34 cerebral cortex and requires nerve connections between the
35 thalamus and the cortex. However, recent medical research and
36 analysis, especially since 2007, provides strong evidence for the
37 conclusion that a functioning cortex is not necessary to experience
38 pain.

39 (7) Substantial evidence indicates that children born missing the
40 bulk of the cerebral cortex, those with hydranencephaly,
41 nevertheless experience pain.

1 (8) In adults, stimulation or ablation of the cerebral cortex does
2 not alter pain perception, while stimulation or ablation of the
3 thalamus does.

4 (9) Substantial evidence indicates that structures used for pain
5 processing in early development differ from those of adults, using
6 different neural elements available at specific times during
7 development, such as the subcortical plate, to fulfill the role of pain
8 processing.

9 (10) The position, asserted by some medical experts, that the
10 unborn child remains in a coma-like sleep state that precludes the
11 unborn child experiencing pain is inconsistent with the documented
12 reaction of unborn children to painful stimuli and with the
13 experience of fetal surgeons who have found it necessary to sedate
14 the unborn child with anesthesia to prevent the unborn child from
15 thrashing about in reaction to invasive surgery.

16 (11) Consequently, there is substantial medical evidence that an
17 unborn child is capable of experiencing pain by twenty weeks after
18 fertilization.

19 (12) It is the purpose of the State to assert a compelling state
20 interest in protecting the lives of unborn children from the stage at
21 which substantial medical evidence indicates that they are capable
22 of feeling pain.

23 (13) South Carolina's compelling state interest in protecting the
24 lives of unborn children from the stage at which substantial medical
25 evidence indicates that they are capable of feeling pain is intended
26 to be separate from and independent of South Carolina's compelling
27 state interest in protecting the lives of unborn children from the stage
28 of viability, and neither state interest is intended to replace the other.

29 (14) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which
30 in the context of determining the severability of a state statute
31 regulating abortion, the United States Supreme Court noted that an
32 explicit statement of legislative intent specifically made applicable
33 to a particular statute is of greater weight than a general savings or
34 severability clause, it is the intent of the State that if any one or more
35 provisions, sections, subsections, sentences, clauses, phrases or
36 words of this article or the application thereof to any person or
37 circumstance is found to be unconstitutional, the same is hereby
38 declared to be severable and the balance of this article shall remain
39 effective notwithstanding such unconstitutionality. Moreover, the
40 State declares that it would have passed this article, and each
41 provision, section, subsection, sentence, clause, phrase or word
42 thereof, irrespective of the fact that any one or more provisions,

1 sections, subsections, sentences, clauses, phrases or words, or any
2 of their applications, were to be declared unconstitutional.

3

4 Section 44-41-430. For the purposes of this article:

5 (1) 'Abortion' means the use or prescription of any instrument,
6 medicine, drug, or any other substance or device:

7 (a) to intentionally kill the unborn child of a woman known
8 to be pregnant; or

9 (b) to intentionally prematurely terminate the pregnancy of a
10 woman known to be pregnant, with an intention other than to
11 increase the probability of a live birth or of preserving the life or
12 health of the child after live birth.

13 (2) 'Attempt to perform or induce an abortion' means an act, or
14 an omission of a statutorily required act, that, under the
15 circumstances as the actor believes them to be, constitutes a
16 substantial step in a course of conduct planned to culminate in the
17 performance or induction of an abortion in this State in violation of
18 this article.

19 (3) 'Department' means the South Carolina Department of
20 Health and Environmental Control.

21 (4) 'Fertilization' means the fusion of a human spermatozoon
22 with a human ovum.

23 (5) 'Medical emergency' means a condition that, in reasonable
24 medical judgment, so complicates the medical condition of the
25 pregnant woman that it necessitates the immediate abortion of her
26 pregnancy without first determining post-fertilization age to avert
27 her death or for which the delay necessary to determine
28 post-fertilization age will create serious risk of substantial and
29 irreversible physical impairment of a major bodily function, not
30 including psychological or emotional conditions. No condition
31 must be considered a medical emergency if based on a claim or
32 diagnosis that the woman will engage in conduct which she intends
33 to result in her death or in substantial and irreversible physical
34 impairment of a major bodily function.

35 (6) 'Physician' means any person licensed to practice medicine
36 and surgery or osteopathic medicine and surgery in this State.

37 (7) 'Post-fertilization age' means the age of the unborn child as
38 calculated from the fusion of a human spermatozoon with a human
39 ovum.

40 (8) 'Probable post-fertilization age of the unborn child' means
41 what, in reasonable medical judgment, will with reasonable
42 probability be the post-fertilization age of the unborn child at the
43 time the abortion is planned to be performed or induced.

1 (9) 'Reasonable medical judgment' means a medical judgment
2 that would be made by a reasonably prudent physician,
3 knowledgeable about the case and the treatment possibilities with
4 respect to the medical conditions involved.

5 (10) 'Unborn child' or 'fetus' each means an individual organism
6 of the species homo sapiens from fertilization until live birth.

7 (11) 'Woman' means a female human being whether or not she
8 has reached the age of majority.

9

10 Section 44-41-440. (A) Except in the case of a medical
11 emergency, no abortion must be performed or induced or be
12 attempted to be performed or induced unless the physician
13 performing or inducing it has first made a determination of the
14 probable post-fertilization age of the unborn child or relied upon
15 such a determination made by another physician. In making such a
16 determination, the physician shall make such inquiries of the woman
17 and perform or cause to be performed such medical examinations
18 and tests as a reasonably prudent physician, knowledgeable about
19 the case and the medical conditions involved, would consider
20 necessary to perform in making an accurate diagnosis with respect
21 to post-fertilization age.

22 (B) Failure by any physician to conform to any requirement of
23 this section constitutes 'unprofessional conduct' pursuant to Section
24 40-47-20(53).

25

26 Section 44-41-450. (A) No person shall perform or induce or
27 attempt to perform or induce an abortion upon a woman when it has
28 been determined, by the physician performing or inducing or
29 attempting to perform or induce the abortion or by another physician
30 upon whose determination that physician relies, that the probable
31 post-fertilization age of the woman's unborn child is twenty or more
32 weeks, unless, in reasonable medical judgment, she has a condition
33 which so complicates her medical condition as to necessitate the
34 abortion of her pregnancy to avert her death or to avert serious risk
35 of substantial and irreversible physical impairment of a major bodily
36 function, not including psychological or emotional conditions. No
37 such greater risk must be considered to exist if it is based on a claim
38 or diagnosis that the woman will engage in conduct which she
39 intends to result in her death or in substantial and irreversible
40 physical impairment of a major bodily function.

41 (B) When an abortion upon a woman whose unborn child has
42 been determined to have a probable post-fertilization age of twenty
43 or more weeks is not prohibited by subsection (A), the physician

1 shall terminate the pregnancy in the manner which, in reasonable
2 medical judgment, provides the best opportunity for the unborn
3 child to survive, unless, in reasonable medical judgment,
4 termination of the pregnancy in that manner would pose a greater
5 risk either of the death of the pregnant woman or of the substantial
6 and irreversible physical impairment of a major bodily function, not
7 including psychological or emotional conditions, of the woman than
8 would other available methods. No such greater risk must be
9 considered to exist if it is based on a claim or diagnosis that the
10 woman will engage in conduct which she intends to result in her
11 death or in substantial and irreversible physical impairment of a
12 major bodily function.

13

14 Section 44-41-460. (A) Any abortion performed in this State
15 must be reported by the performing physician on the standard form
16 for reporting abortions to the state registrar, Department of Health
17 and Environmental Control, within seven days after the abortion is
18 performed. The names of the patient and physician may not be
19 reported on the form or otherwise disclosed to the state registrar.
20 The form must indicate from whom consent was obtained or
21 circumstances waiving consent and must include:

22 (1) Post-fertilization age:

23 (a) if a determination of probable post-fertilization age was
24 made, whether ultrasound was employed in making the
25 determination, and the week of probable post-fertilization age
26 determined; or

27 (b) if a determination of probable post-fertilization age was
28 not made, the basis of the determination that a medical emergency
29 existed.

30 (2) Method of abortion, of which the following was
31 employed:

32 (a) medication abortion such as, but not limited to,
33 mifepristone/misoprostol or methotrexate/misoprostol;

34 (b) manual vacuum aspiration;

35 (c) electrical vacuum aspiration;

36 (d) dilation and evacuation;

37 (e) combined induction abortion and dilation and
38 evacuation;

39 (f) induction abortion with prostaglandins;

40 (g) induction abortion with intra-amniotic instillation such
41 as, but not limited to, saline or urea;

42 (h) induction abortion; and

43 (i) intact dilation and extraction (partial-birth).

1 (3) Whether an intrafetal injection was used in an attempt to
2 induce fetal demise such as, but not limited to, intrafetal potassium
3 chloride or digoxin.

4 (4) Age of the patient.

5 (5) If the probable post-fertilization age was determined to be
6 twenty or more weeks, the basis of the determination that the
7 pregnant woman had a condition which so complicated her medical
8 condition as to necessitate the abortion of her pregnancy to avert her
9 death or to avert serious risk of substantial and irreversible physical
10 impairment of a major bodily function, not including psychological
11 or emotional conditions.

12 (6) If the probable post-fertilization age was determined to be
13 twenty or more weeks, whether or not the method of abortion used
14 was one that, in reasonable medical judgment, provided the best
15 opportunity for the unborn child to survive and, if such a method
16 was not used, the basis of the determination that termination of the
17 pregnancy in that manner would pose a greater risk either of the
18 death of the pregnant woman or of the substantial and irreversible
19 physical impairment of a major bodily function, not including
20 psychological or emotional conditions, of the woman than would
21 other available methods.

22 (B) Reports required by subsection (A) shall not contain the
23 name or the address of the patient whose pregnancy was terminated,
24 nor shall the report contain any other information identifying the
25 patient, except that each report shall contain a unique medical record
26 identifying number, to enable matching the report to the patient's
27 medical records. Such reports must be maintained in strict
28 confidence by the department, must not be available for public
29 inspection, and must not be made available except:

30 (1) to the Attorney General or solicitor with appropriate
31 jurisdiction pursuant to a criminal investigation;

32 (2) to the Attorney General or solicitor pursuant to a civil
33 investigation of the grounds for an action under Section
34 44-41-480(B); or

35 (3) pursuant to court order in an action under Section
36 44-41-480.

37 (C) By June thirtieth of each year, the department shall issue a
38 public report providing statistics for the previous calendar year
39 compiled from all of the reports covering that year submitted in
40 accordance with this section for each of the items listed in
41 subsection (A). Each such report also shall provide the statistics for
42 all previous calendar years during which this section was in effect,
43 adjusted to reflect any additional information from late or corrected

1 reports. The department shall take care to ensure that none of the
2 information included in the public reports could reasonably lead to
3 the identification of any pregnant woman upon whom an abortion
4 was performed, induced, or attempted.

5 (D) Any physician who fails to submit a report by the end of
6 thirty days following the due date must be subject to a late fee of
7 one thousand dollars for each additional thirty-day period or portion
8 of a thirty-day period the report is overdue. Any physician required
9 to report in accordance with this article who has not submitted a
10 report, or has submitted only an incomplete report, more than six
11 months following the due date, may, in an action brought by the
12 department, be directed by a court of competent jurisdiction to
13 submit a complete report within a period stated by court order or be
14 subject to civil contempt. Intentional or reckless failure by any
15 physician to conform to any requirement of this section, other than
16 late filing of a report, constitutes 'unprofessional conduct' pursuant
17 to Section 40-47-20(53). Intentional or reckless failure by any
18 physician to submit a complete report in accordance with a court
19 order constitutes 'unprofessional conduct' pursuant to Section
20 40-47-20(53). Intentional or reckless falsification of any report
21 required under this section is a misdemeanor punishable by not more
22 than one year in prison.

23 (E) Within ninety days of the effective date of this article, the
24 Department of Health and Human Services shall adopt and
25 promulgate forms and regulations to assist in compliance with this
26 section. Subsection (A) shall take effect so as to require reports
27 regarding all abortions performed or induced on and after the first
28 day of the first calendar month following the effective date of such
29 rules.

30
31 Section 44-41-470. Any person who intentionally or knowingly
32 fails to conform to any requirement in Section 44-41-440 is guilty
33 of a misdemeanor and, upon conviction, must be fined not less than
34 two thousand dollars nor more than ten thousand dollars or
35 imprisoned for not more than three years, or both. No part of the
36 minimum fine may be suspended. For conviction of a third or
37 subsequent offense, the sentence must be imprisonment for not less
38 than sixty days nor more than three years, no part of which may be
39 suspended.

40
41 Section 44-41-480. (A) Any woman upon whom an abortion has
42 been performed or induced in violation of this article, or the father
43 of the unborn child who was the subject of such an abortion, may

1 maintain an action against the person who performed or induced the
2 abortion in intentional or reckless violation of this article for actual
3 and punitive damages. Any woman upon whom an abortion has
4 been attempted in violation of this article may maintain an action
5 against the person who attempted to perform or induce the abortion
6 in an intentional or reckless violation of this article for actual and
7 punitive damages.

8 (B) A cause of action for injunctive relief against any person
9 who has intentionally or recklessly violated this article may be
10 maintained by the woman upon whom an abortion was performed
11 or induced or attempted to be performed or induced in violation of
12 this article; by any person who is the spouse, parent, sibling or
13 guardian of, or a current or former licensed health care provider of,
14 the woman upon whom an abortion has been performed or induced
15 or attempted to be performed or induced in violation of this article;
16 by a county attorney with appropriate jurisdiction; or by the
17 Attorney General. The injunction shall prevent the abortion provider
18 from performing or inducing or attempting to perform or induce
19 further abortions in violation of this article in this State.

20 (C) If judgment is rendered in favor of the plaintiff in an action
21 described in this section, the court also shall render judgment for a
22 reasonable attorney's fee in favor of the plaintiff against the
23 defendant.

24 (D) No damages or attorney's fee may be assessed against the
25 woman upon whom an abortion was performed or induced or
26 attempted to be performed or induced.

27
28 Section 44-41-490. In every civil or criminal proceeding or action
29 brought under this article, the court shall rule whether the anonymity
30 of any woman upon whom an abortion has been performed or
31 induced or attempted to be performed or induced must be preserved
32 from public disclosure if she does not give her consent to such
33 disclosure. The court, upon motion or sua sponte, shall make such
34 a ruling and, upon determining that her anonymity should be
35 preserved, shall issue orders to the parties, witnesses, and counsel
36 and shall direct the sealing of the record and exclusion of individuals
37 from courtrooms or hearing rooms to the extent necessary to
38 safeguard her identity from public disclosure. In the absence of
39 written consent of the woman upon whom an abortion has been
40 performed or induced or attempted to be performed or induced,
41 anyone, other than a public official, who brings an action under
42 Section 44-41-480(A) or (B) shall do so under a pseudonym. This
43 section may not be construed to conceal the identity of the plaintiff

1 or of witnesses from the defendant or from attorneys for the
2 defendant.

3

4 Section 44-41-500. This article must not be construed to repeal,
5 by implication or otherwise, Section 44-41-20 or any otherwise
6 applicable provision of South Carolina law regulating or restricting
7 abortion. An abortion that complies with this article but violates the
8 provisions of Section 44-41-20 or any otherwise applicable
9 provision of South Carolina law must be considered unlawful as
10 provided in such provision. An abortion that complies with the
11 provisions of Section 44-41-20 or any otherwise applicable
12 provision of South Carolina law regulating or restricting abortion
13 but violates this article must be considered unlawful as provided in
14 this article. If some or all of the provisions of this article are ever
15 temporarily or permanently restrained or enjoined by judicial order,
16 all other provisions of South Carolina law regulating or restricting
17 abortion must be enforced as though such restrained or enjoined
18 provisions had not been adopted; provided, however, that whenever
19 such temporary or permanent restraining order of injunction is
20 stayed or dissolved, or otherwise ceases to have effect, such
21 provisions shall have full force and effect."

22

23 SECTION 2. This act takes effect upon approval of the Governor.

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25